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8 Inc.*

9
10 **IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

11 Douglas Wilkerson, et al.,

NO. 2:15-cv-01656-DJH

12 Plaintiffs,

13 vs.

14 EGS Customer Care, Inc.

15 Defendant.

**RESPONSE TO 12/15/16 ORDER (DOC.
27) AND RENEWED JOINT MOTION
FOR APPROVAL OF SETTLEMENT
AGREEMENT AND STIPULATION TO
DISMISS ALL CLAIMS WITH
PREJUDICE**

20 MAY IT PLEASE THE COURT:

21 Plaintiffs Douglas Wilkerson, Joshua Luna and Ryan Adverderada (“Plaintiffs”),
22 through undersigned counsel, respectfully offer this response to the Court’s December 15,
23 2016 Order (Doc. 27) and, together with Defendant EGS Customer Care, Inc. (“EGS”), renew
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1 their joint motion for approval of settlement agreement and stipulation to dismiss all claims
2 with prejudice.

3 **BACKGROUND & PROCEDURAL HISTORY**

4 Plaintiffs filed this action on August 24, 2015 against Expert Global Solutions, Inc.
5 seeking unpaid wages under the Fair Labor Standards Act. On September 8, 2015, Plaintiffs
6 amended their complaint to substitute EGS Customer Care, Inc., for Expert Global Solutions,
7 Inc., which was incorrectly named in the original Complaint. EGS has denied any
8 wrongdoing and that any wages are due.
9

10 On January 5, 2016, the Court entered a Scheduling Order requiring, among other
11 things, the parties to engage in good faith settlement talks by October 19, 2016 and to report
12 to the Court on those talks within 5 days thereafter. See 1/5/16 Scheduling Order (Doc. 17)
13 at ¶ 8. The Court also instructed Plaintiffs to notify the Court that the parties were ready for
14 a Final Pretrial Conference within 10 days after a November 23, 2016 dispositive motion
15 deadline, *i.e.*, Monday, December 5, 2016. *Id.* at ¶¶ 7 and 10.
16

17 In compliance with the Scheduling Order, the parties engaged in discovery including
18 depositions, and conducted several settlement negotiations sessions by phone and also in
19 person. On October 11, 2016, the parties reported to the Court that further settlement
20 discussions would continue. See Doc. 23. Eventually, those discussions produced a
21 settlement, and Plaintiffs each signed a settlement agreement of the material terms on
22 November 7, 2016. EGS signed the settlement on November 17, 2016.
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24 Following the settlement, the parties worked diligently to work through procedural
25 issues and finalize a motion seeking Court approval. In the midst of these efforts, the Court's

1 December 5, 2016 deadline for Plaintiffs to disclose the parties' readiness for pretrial
2 conference came and passed without notice. As a result, the Court issued its December 13,
3 2016 Order instructing Plaintiffs to show cause by December 19, 2016 why this lawsuit
4 should not be dismissed for failing to file a Notice of Readiness for Pretrial Conference (Doc.
5 24).

6 The following day, Plaintiffs filed a Motion to Approve Consent Judgment along with
7 a proposed Order (Docs. 25 and 26) with the belief and intention that the filing would serve
8 to respond to the Court's December 13th Order, and place the disposition of the parties'
9 settlement within the Court's consideration.

10
11 On December 15, 2016, the Court denied the motion. See 12/15/16 Order (Doc. 27).
12 In its order, the Court (1) requested clarification as to the meaning of certain language
13 contained in the motion papers, (2) observed a blank line in the parties' settlement agreement
14 establishing the "Effective Date" of the agreement, and (3) noted that the settlement
15 agreement was inadvertently filed while the proposed order submitted with the motion
16 indicated that the agreement would be filed under seal.

17
18 In response to the Court's 12/15/16 Order, Plaintiffs submitted another joint motion
19 on December 19, 2016 (Doc. 28). The submission addressed the Court's observation
20 regarding the inadvertently filed settlement agreement and included an argument seeking
21 approval to file the settlement agreement under seal. Unfortunately, the settlement agreement
22 was again filed into the record and not under seal. Also, rather than explain the language that
23 caused the confusion for which this Court had requested clarification, the confusing language
24 was simply deleted. Lastly, the settlement agreement again failed to include/clarify the

1 “Effective Date” in the agreement. The same day, the Court denied that motion as
2 inappropriately filed, but without written reasons. See 12/19/16 Order (Doc. 29).

3 The parties gather from the Court’s *sua sponte* denial that a detailed response to the
4 Court’s 12/15/16 Order (Doc. 27) is expected. With that understanding, the parties address
5 the Court’s concerns now:

6 1. Clarification of Motion Language

7 The Court raised concern with the following language at page 2, lines 21-24 of the
8 parties original joint motion, and sought clarification thereon:

9
10 Following the logic of [other precedent], such a settlement
11 agreement could reasonably be found binding upon the parties
12 even without court approval”).

13 This language was taken directly from Hon. Judge Frederick Martone’s ruling in
14 *Smith v. Tri-City Transmission Serv.*, 2012 U.S. Dist. LEXIS 119428 (D. Ariz. Aug. 23,
15 2012), which was cited and quoted in the parties’ original motion, in the paragraph
16 immediately preceding the language at issue. Regrettably, a short form citation to the *Smith*
17 decision was not provided, which may be responsible in part for the Court’s concerns. To
18 clarify, the pinpoint citation to this passage is *Smith v. Tri-City Transmission Serv.*, 201 U.S.
19 Dist. LEXIS 119428, 2:12-cv-01254-FJM, *2 (D. Ariz. Aug. 23, 2012). That case involved
20 circumstances similar to the matter presently under review; there, the court recognized that
21 when parties to an FLSA case settle their disagreements within the context of a pending
22 lawsuit, as the present parties have done, “such a settlement could reasonably be found
23 binding upon the parties even without court approval.” *Id.* The parties believe that holding
24 is pertinent here, although, out of an abundance of caution and a desire to remove any doubt

that their settlement agreement has binding *res judicata* effect, the parties present the settlement agreement to this Court for consideration and approval.

2. The Effective Date of the Settlement Agreement

The Court also expressed concern with a blank space on page 1 of the settlement agreement concerning the “Effective Date” of the agreement. The Effective Date of the settlement agreement is intended to be the date by which all parties have signed the settlement. Plaintiffs signed the settlement on November 7, 2016, and EGS signed the agreement on November 17, 2016. The November 17, 2016 date should have been inserted in the blank space in the settlement agreement. This oversight has been corrected in the redacted settlement agreement filed herewith.

3. The Filing of the Settlement Agreement

The parties had originally intended to file the settlement agreement under seal; by an oversight, Plaintiffs filed the settlement agreement into the record on multiple occasions. The Court has since stricken those filings. See 12/19/16 Order (Doc. 29). The parties have since acknowledged and agreed with one another that filing a redacted settlement agreement in the record is not inconsistent with the confidentiality bargained for under the settlement. Consequently, for purposes of this motion, the parties will file and refer to a settlement agreement in which only the amounts due under the settlement have been redacted. To be clear, the parties do not request this settlement agreement be filed under seal.

Subject to the foregoing, the parties now jointly renew their motion for approval of settlement agreement and stipulation to dismiss all claims with prejudice, as follows:

1 The above-captioned Fair Labor Standards Act (“FLSA”) lawsuit has been settled.
2 EGS and Plaintiffs respectfully move the Court to: (1) approve the redacted settlement
3 agreement that is attached as **Exhibit A** as fair and reasonable; and (2) for an Order approving
4 the settlement agreement and dismissing *with prejudice* all of the claims that are alleged in
5 this matter. The parties respectfully submit that this Motion should be granted because the
6 settlement agreement was reached in an adversarial context and represents a fair and
7 reasonable resolution of a *bona fide* dispute.
8

9 The parties bring this Motion to the Court out of an abundance of caution as, in the
10 context of suits brought directly by employees against their employer under Section 216(b)
11 to recover back wages for alleged FLSA violations, there is precedent indicating that the
12 parties should present any proposed settlement to the district court, which may enter a
13 stipulated judgment after reviewing the settlement for fairness. *Lynn's Food Stores, Inc. v.*
14 *United States*, 679 F.2d 1350, 1353 (11th Cir. 1982); *see also Brooklyn Savings Bank v.*
15 *O'Neil*, 324 U.S. 697 (1945). Though the Ninth Circuit has yet to offer any guidance to this
16 regard, there is precedent from this district that indicates, where parties are represented by
17 counsel and aware of their relevant rights, their settlement of FLSA claims should be
18 permitted binding effect even without court approval. *See Smith v. Tri-City Transmission*
19 *Serv.*, 2012 U.S. Dist. LEXIS 119428 (D. Ariz. Aug. 23, 2012) (holding that “[i]t is no longer
20 clear that settlement of FLSA claims must be approved by the court to be binding, especially
21 in a case such as this Plaintiffs were represented by counsel when they filed their
22 complaint . . . and throughout the course of this litigation. They alleged violations of the
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1 FLSA in their complaint, therefore they were obviously aware of their rights under this
2 statute.

3 The parties settled their disagreements within the context of a pending lawsuit.
4 Accordingly, especially where the parties are represented by competent counsel and where
5 settlement is arrived at in the context of adversarial proceedings already underway, at least
6 some deference should be given to the parties' decision to settle the matter and to the terms
7 of that settlement.
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9 In this case, both Plaintiffs and EGS are, and have been, represented by competent and
10 accomplished attorneys who are well aware of the law at issue in this matter and who have
11 apprised their clients of that law in relation to their clients' interests. The parties, recognizing
12 the various countervailing considerations at issue and being fully apprised by counsel, have
13 reached a compromise to resolve this action, including attorneys' fees for Plaintiffs.
14

15 More specifically, as this Court is certainly already aware, the law governing wage
16 disputes, especially those involving overtime exemptions under the Fair Labor Standards Act
17 ("FLSA") as in this litigation, often presents ambiguity and the circumstances surrounding
18 such claims often permit reasonable parties to present differing views as to the viability of
19 the wage claims asserted. As this Court is also aware, litigation is a costly and demanding
20 process for which the result is often uncertain to a very high degree. The parties, knowing
21 the claims at issue and their attendant circumstances, the law governing the dispute, and the
22 risks, uncertainties, and costs of further litigation, as well as being fully advised by legal
23 counsel of their choosing, have, in the context of ongoing adversarial proceedings, agreed
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1 that the settlement agreement represents a fair resolution and reasonable compromise to
2 Plaintiffs' claims.

3 **I. Approval of Settlement and Dismissal**

4 1. This matter concerns a claim by Plaintiffs that they were improperly compensated
5 under the FLSA.

6 2. EGS denies Plaintiffs are due any wages, and denies that Plaintiffs were not properly
7 compensated and denies any liability to Plaintiffs.

8 3. The parties, through their counsel and designated representatives, reached a
9 compromise to resolve this action, including attorneys' fees for Plaintiffs, pursuant to the
10 terms set forth in the settlement agreement attached as **Exhibit A**. The settlement agreement
11 provides for a specific settlement amount to be paid to Plaintiffs, and an amount to be paid to
12 Plaintiffs' attorney. The settlement agreement also includes a release of claims by Plaintiffs
13 and a confidentiality provision.

14 4. The parties agree that the settlement agreement represents a fair and equitable
15 resolution and reasonable compromise.

16 5. The settlement agreement is in the best interests of all the parties and has been accepted
17 by the parties. The parties have executed the settlement agreement.

18 6. The parties, through their respective counsel, hereby move for approval of this
19 settlement and dismissal of this action with prejudice, on the merits and without awarding
20 additional fees or costs to either party, as set forth in the proposed order accompanying this
21 joint motion.

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7. Neither this joint motion nor the proposed order is intended to constitute an admission or concession by EGS of any liability or wrongdoing.

8. The parties respectfully request that the Court approve the terms of the settlement agreement because it represents a fair and reasonable resolution of *bona fide* disputes over alleged unpaid overtime wages under the FLSA.

9. All the parties have been represented by competent counsel.

WHEREFORE, the parties request that the Court review the settlement agreement and issue an Order approving it as fair and reasonable. A copy of the proposed order is attached.

DATED: this 9th day of January, 2017.

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